

SOAH DOCKET NO. 582-09-1256
TCEQ DOCKET NO. 2008-0642-MLM-EEXECUTIVE DIRECTOR OR THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

VS.

WEIRICH BROTHERS, L.P.;
RN101935492
RESPONDENT

BEFORE THE

STATE OFFICE OF

ADMINISTRATIVE HEARINGS

CHIEF CLERKS OFFICE

2009 OCT -7 PM 3:36

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

RESPONDENT'S EXCEPTIONS TO THE EXECUTIVE DIRECTOR'S
EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S PROPOSED ORDER

Now comes the Respondent, and by and through his representative, Terry Weirich, and submits the following exceptions to the Executive Directors (ED) exceptions.

1. The Respondent respectfully excepts to the ED objection to the Administrative Law Judge's (ALJ) disallowing the 5% penalty enhancement for prior NOV with the same or similar violations.
2. The Respondent respectfully excepts to the ED's objection to the ALJ's disallowing of the 20% penalty enhancement for violating a prior agreed order denying liability.
3. The Respondent respectfully excepts to the ED's objection to the ALJ's finding that Terry Weirich is unable to pay the penalty.
4. The Respondent respectfully requests that the ED's amendment to the finding of fact #15 should be stricken. The July, 16, 2007 NOV was partially for a landfill that does not belong to the Respondent. Furthermore, even after the landfill was removed from the citation, it was never reapplied to the rightful owner giving the Respondent cause to believe the other violations should also be dropped.
5. The Respondent respectfully requests that the ED's amendment to add finding of fact # 16 be stricken. Respondent contends that the December, 30, 2005 enforcement order was only agreed to in order to resolve the matter and the denial of liability was because the spill was less than 20 gallons and not believed to be reportable.
6. The Respondent respectfully requests that the ALJ's Proposed Order not be amended to renumber statements in the finding of facts.
7. The Respondent respectfully requests that the ALJ's Proposed Order not be amended from old statement #15 to new statement #17 while the \$2500.00 is reasonable. It is still more than the Respondent can afford. The Respondent agrees with the ALJ's analysis that the ED improperly enhanced

the base penalties due to the length of processing time of the violation. The Respondent respectfully requests that the penalty should not be multiplied by 3 or enhanced by 27%.

8. The Respondent respectfully requests that the ALJ's Proposed Order not be amended from old statement #16 to new statement #18. The Respondent requests that the Commission takes in consideration that the law against outdoor burning is very broad and may not require knowledge or intent, but the action itself in this particular instance was an effort to comply with the July 16, 2007 NOV. Further enhancements have already been discussed and should be deleted.

9. The Respondent respectfully requests that the Commission consider the ALJ's summary that in light of the facts of this case, that the overall penalty be reduced. The Respondent requests that the ED's Conclusion of Law, statement #16 be amended to read "The Respondent be assessed the minimum administrative penalty of \$1200.00".

10. The Respondent respectfully requests that the ED's amendment to the ALJ's first sentence of III be stricken. The Respondent requests that the Ordering Provision, statement 1 should read, "Within 60 days after the effective day of this Commission Order, Weirich Brothers L.P. shall pay an administrative penalty of \$1200.00."

11. The Respondent respectfully requests that the ED's amendment to the ALJ's Finding of Fact, old statement #18, new statement #20 be denied. The new statement #20 should read, "Mr. Terry Weirich was the general partner of Weirich Brothers L.P.. Weirich Brothers has petitioned the Secretary of State to remove the companies name from the list of operating companies.

12. The Respondent respectfully requests that the ED's amendment of the new statement #19 of the Conclusion of Law be denied and the Commission upholds the findings of the ALJ that Terry Weirich do not have the ability to pay.

13. The Respondent respectfully requests that the ED's amendment to include I and II in the Finding of Fact and the Conclusion of Law be denied.

14. The Respondent respectfully requests that the ED's finding of Fact #2 read "The Respondent caused the outdoor burning of tires, hose, plastic lubricant containers, and aerosol cans at the plant by accident in an effort to comply with NOV dated July 16, 2007.

15. The Respondent respectfully requests that the ED's Finding of Fact delete in the statement #3 the sentence "The Respondent did not properly dispose of the tires and scrape metal." Note invoices to tire and recycling disposal companies. See attachment B.

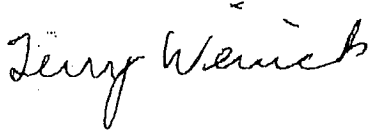
16. The Respondent respectfully requests that the ED's Finding of Fact statement #14 and #15 be deleted.

17. The Respondent respectfully requests that the ED's Finding of Fact statement #21 should read "The Respondent has no longer has access to the plant but corrective action has already been taken. See Attachment B.

PRAYER

The Respondent grieves at having violated any state laws. We hope with our corrective actions we have prevented any endangerment of public health and ask that the Commission accept the Administrative Law Judge's Summary and exercise it's discretion to assess a lower penalty.

Respectfully submitted,

A handwritten signature in cursive script that reads "Terry Weirich".

Terry Weirich, L.P.

Certificate of Service

I herby certify that on October 7th 2009 the original and 7 copies of the foregoing Respondents proposed modifications to the Executives Directors proposed modifications to the Administrative Law Judges Proposed Order were filed with the Chief clerk, Texas Commission on Environmental Quality, Austin Texas. I further certify on this day a true and correct copy of the foregoing and proposed modifications were sent to the following:

Kerrie Jo Qualtrough
Administrative Law judge
State Office of Administrative Hearings
P.O. 13025
Austin, Texas 78711-3025
512/475-4993 FAX 512/475-4994

Tammy L. Mitchell
TCEQ Litigation Division MC 175
P.O. Box 13087
Austin, Texas 78711-3087
512/239-3400 FAX 512/239-3434

Docket Clerk
TCEQ office of Chief Clerk MC 105
P.O. box 13087
Austin, Texas 78711-3087
512/239-3300 FAX 512/239-3311

CHIEF CLERKS OFFICE

2009 OCT -7 PM 3:37

TEXAS
COMMISSION
ON ENVIRONMENTAL
QUALITY

10/07/2009 15:33

Received:
8309970132

Oct 7 2009 03:28pm
LT ANSWERING

PAGE 05/15

ATTACHMENT A

SOAH DOCKET NO. 582-09-1256
TCEQ DOCKET NO. 2008-0642-MLM-EEXECUTIVE DIRECTOR OR THE
TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY,
PETITIONER

BEFORE THE

VS.

STATE OFFICE OF

WEIRICH BROTHERS, L.P.;
RN101935492
RESPONDENT

ADMINISTRATIVE HEARINGS

RESPONDENTS BRIEFS SUPPORTING EXCEPTIONS TO THE EXECUTIVE DIRECTORS PROPOSED
MODIFICATIONS TO THE ADMINISTRATIVE LAW JUDGES PROPOSED ORDER.

NOW COMES the Respondent, by and through his representative, Terry Weirich and submits this brief in support of the Respondents Exceptions to the Executive Directors Proposed Modifications. The Respondent respectfully contends that the Executive Director erred in assessing the administrative penalty against the Respondent and in finding that the Respondents general partner is able to pay the penalty. As such, the Respondent submits this Brief Supporting the Respondents Exceptions to the Executive Directors Proposed Modifications.

I. INTRODUCTION

This enforcement action, brought by the Executive Director of the Texas Commission of Environmental Quality or ("TCEQ" or "the commission") against Weirich Brothers, L.P. ("Weirich and Respondent") asserts a violations of Tex. Health & Safety 382.085(b) and 30 Tex. Admin. Code 335.4 and 111.201 for failure to handle industrial waste in such a manner as to prevent the endangerment of public health and welfare and for failure to comply with the prohibition against outdoor burning. Parties stipulated to violations, which were not denied at hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

On May 14, 2009 the evidentiary hearing for this matter was convened at the State Office of Administrative Hearings ("SOAH"). The Executive Director was represented by Ms. Tammy Mitchell and Mr. Rudy Calderon. Although the Respondent was previously represented by counsel, The Respondent could no longer afford an attorney due to the increase in discovery required from the ED. and the Respondent was represented instead by Mr. Terry Weirich, general partner of Weirich Brothers, L.P.

On July 8th the ALJ issued her proposal for decision, which recommended a reduced penalty and found that Terry Weirich was individually unable to pay the penalty.

The Respondent concurs with the ALJ's decision and files exceptions to the ED's Proposed Modifications.

III. DISCUSSION

A. The Respondent respectfully asserts the ED erred in assessing the penalty amount.

1. The July 16, 2007 Notice of Violation included the same or similar violation but should not enhance the penalty by 5%.

The Respondent contends that there was not an improper handling of industrial waste and in addition Mr. Weirich testified that although "the landfill" violation was dropped, it was never reapplied to the rightful owner. Therefore it was questioned that if the landowner was not penalized for his landfill, why was the Respondent penalized for the remaining NOV's?

Furthermore, the Respondent contends that the remaining NOV's were explainable:

- a. The tires had been stacked to form a retaining wall around an aggregate stockpile. Therefore, they served a purpose and were not considered an industrial waste. Prior to the July 16, 2007 inspection the stockpile was removed and the tires remained in a semi covered state. The Respondent also would like to point out that the tires were removed a considerable expense. (See exhibit B i.e. invoices to J and M Tire Company)
- b. The scrap iron pile was a resource of Weirich Brothers, L.P. and was a source of iron and steel that was continually used and reused. The semi buried state of the scrap iron pile was only an effort to construct berms around the pile to satisfy requirements set forth in our Storm Water Plan. The berms were necessary to prevent rain water runoff.

The Respondent therefore requests that the July 16, 2007 NOV's not be considered or enhanced.

2. The Respondent contends that an enhancement of 20% because of a prior Commission Order is not totally fair. The denial of liability on TCEQ Docket # 2005-005-WQ-E was justified. TCEQ rules, at that time, required that only spills of 20 Gal. or more be reported. The Respondent contends that the spill in the above Commission Order was less than 20 Gal. The Respondent did not contest the matter only to resolve the issue quickly, but did deny any liability. Therefore, a 20% enhancement is not justified.

B. The Respondent and his attorney tried to comply with all ED requests. Considerable time and effort was applied to getting the necessary information. However, after the initial ED discovery was satisfied, the ED continued to request more and more information. Most of the requests were complied with, but some were neglected due to attorney oversight. It was only during the ALJ's hearing that the Respondent learned of documents requested and not received by the ED. However the discovery and rediscovery process was enough to deplete the financial resources of the Respondent. The projected \$800.00 attorney's fees had increased to \$1400.00. The Respondent had no choice other than to dismiss his attorney.

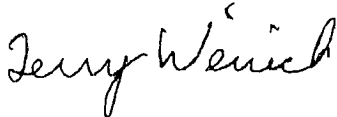
The Respondent believes that the initial discovery was enough information for the ED to formulate a conclusion about the Respondents ability to pay. The additional requests from the ED were nothing more than harassment. The additional information would have made no difference to the ED's conclusions. As Ms. Seidenberger had testified, the nearly \$360,000.00 in undivided real estate was enough to determine that Terry Weirich, personally had enough assets to pay the penalty. It is clear that it makes no difference to the ED that the property referenced above is an undivided Estate with disputes among its heirs as to its distribution. The ED apparently does not realize that disputes among heirs can not only prevent the sale of the property but also discourages bankers from providing equity loans.

The key man insurance policy was one hope the respondent had to be able to pay our fines and dissolve the company. However with the economic downturn it became necessary to use the money to survive. The money was divided between the three share holders and was used to reimburse salaries that were not paid since January 2007.

IV PRAYER

The Respondent respectfully requests that the Commission accept the ALJ's summary to exercise discretion and consider leniency to lower the penalty to \$1200.00. The respondent further requests the Commission find Mr. Terry Weirich individually unable to pay the penalty.

Respectfully Yours,



Weirich Brothers, L.P.
Terry Weirich

10/07/2009 15:33

Received:
8309970132

Oct 7 2009 03:29pm
LT ANSWERING

PAGE 09/15

ATTACHMENT B

10/07/2009 15:33

Whole Used or Scrap Tire Manifest

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY • P.O. Box 13107 • Austin, Texas 78711-3007 • (512) 230-6001

1. GENERATOR INFORMATION AND CERTIFICATION:

Date and Time of Pickup: 3-21-08

Registration Number/Type of Generator

830,992-0037

Area Code/Telephone Number

W.P. RICH BROS.

Company Name

P.O. Box 206

Street Address

Johnson City, TX 77636

City

State

Zip

Box 579

No. of Whole Passenger Tires

TRK 182 UTR 23

No. of Whole Truck Tires

Has the generator been charged for the service?

Yes ☒ No ☐ (circle one)

I certify that the information provided above is true and correct. I am aware that falsification of this manifest may result in suspension, revocation, or denial of renewal of my generator registration.

Print Name: KERRY W. WARDSignature: Kerry Ward

2. TRANSPORTER INFORMATION AND CERTIFICATION:

J & M Truck Tire Shop

Company Name

Registration Number

28033

Driver's License Number

23212525Print Name: Thomas M. MURPHYSignature: Thomas M. Murphy

3. SECONDARY TRANSPORTER INFORMATION AND CERTIFICATION:

Company Name

Registration Number

Driver's License Number

Print Name:

Signature:

By my signature I certify that the information provided above is true and correct and that only what is in item 1 of this manifest are contained in this load. I am aware that falsification of this manifest may result in suspension, revocation, or denial of renewal of my transporter registration.

ADJUSTMENT BOX

of Tires Picked Up:

79

Passenger Tires

Truck Tires

0

Removed for Reuse:

19

Location and Intended Use of Removed Tires:

1820303

4. PROCESSOR INFORMATION AND CERTIFICATION:

79543

Registration Number

19

Date and Time of Pickup

182

OR

23

lbs

No. Passenger Tires

No. Truck Tires

Weight of Tires

210, 628-1824

Area Code/Telephone Number

J & M Truck Tire Shop

Company Name

11420 Hwy 16 South

Street Address

San Antonio, Tx

City

State

78224

Zip

5. STORAGE/DISPOSAL SITE INFORMATION AND CERTIFICATION:

Registration Number

79

Date and Time of Pickup

182

OR

23

lbs

No. Passenger Tires

No. Truck Tires

Weight of Tires

210, 661-7558

Area Code/Telephone Number

B.I. Landfill

Company Name

7000 IH 10 East

Street Address

San Antonio, Tx

City

State

78219

Zip

I certify that the information provided above is true and correct and that I have been authorized by the Texas Commission on Environmental Quality to accept whole used or scrap tires for storage, processing, or disposal. I am aware that falsification of this manifest may result in enforcement action.

Signature: Alexa MartinezPrint Name: Alexa MartinezSignature: [Signature]Print Name: [Signature]

A copy of each transaction must be retained by each party for a period of three years. The processor or disposal facility operator must mail a copy of the completed manifest back to the generator. Following each transaction, the copy separated from the manifest should be the bottom copy. (Green - Generator; yellow - transporter; blue - processor; pink - disposal facility; white-generator)

If you have questions on how to fill out this form or about the scrap tire program, please contact us at 512/230-6001. Individuals are entitled to request and review their personal information that the agency gathers on its forms. They may also have any errors in their information corrected. To review such information, contact us at 512/230-3282.

(TCEQ 10304 9/22/98)

A copy of each transaction must be retained by each party for a period of three years. The processor or disposal facility operator must mail a copy of the completed manifest back to the generator. Following each transaction, the copy separated from the manifest should be the bottom copy. (Green-Generator; yellow-transporter; blue-processor; pink-disposal facility; white original-generator)

HILL COUNTRY RECYCLING CORP.

(830) 693-3667

2000 2ND Street Marble Falls, TX 78654CUSTOMER'S NAME: Wierck Brothers

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

DATE	LICENSE NO.	CHECK NO.		
8-1				
WEIGHT	ARTICLES	PRICE	AMOUNT	
	NO. 1 COPPER			
	NO. 2 COPPER			
	INSUL COPPER			
	RED BRASS			
	YELLOW BRASS			
	DIRTY BRASS			
	RADIATORS			
	ALUMINUM COOLERS			
	CAST ALUMINUM			
	SHEET ALUMINUM			
	DIRTY ALUMINUM			
	ALUMINUM CANS			
	ALUMINUM COPPER CORE			
	ALUMINUM			
	A.C.S.R.			
	NEOPRENE			
	STAINLESS STEEL			
	LEAD			
	BATTERIES			
26,970	IRON	65¢	781	16
	SHORT IRON			
	TIN			

10/4/09

CL# 10610

I hereby certify that I have the right to possess and sell this property.
Por medio de esta firma, atestiguo y verifico que yo soy el dueño de esta propiedad y tengo el derecho de poseerla y venderla

GRAND TOTAL:

Signed By: _____

RECEIVED PAYMENT IN FULL

HILL COUNTRY RECYCLING CORP.

(830) 693-3667

2000 2ND Street Marble Falls, TX 78654CUSTOMER'S NAME: Wierck Junction

ADDRESS: _____

CITY: _____ STATE: _____ ZIP: _____

DATE	LICENSE NO.	CHECK NO.		
9-2				
WEIGHT	ARTICLES	PRICE	AMOUNT	
	NO. 1 COPPER			
	NO. 2 COPPER			
	INSUL COPPER			
	RED BRASS			
	YELLOW BRASS			
	DIRTY BRASS			
	RADIATORS			
	ALUMINUM COOLERS			
	CAST ALUMINUM			
	SHEET ALUMINUM			
	DIRTY ALUMINUM			
	ALUMINUM CANS			
	ALUMINUM COPPER CORE			
	ALUMINUM			
	A.C.S.R.			
	NEOPRENE			
	STAINLESS STEEL			
	LEAD			
	BATTERIES			
63,380	IRON un prepared	75¢	2122	10
	SHORT IRON			
40,160	TIN Car Bodies	75¢	3012	00

Plu H. 2784
2790
2757

\$400.00 - from WBI Tower

CL# 13400

I hereby certify that I have the right to possess and sell this property.
Por medio de esta firma, atestiguo y verifico que yo soy el dueño de esta propiedad y tengo el derecho de poseerla y venderla

GRAND TOTAL:

Signed By: _____

RECEIVED PAYMENT IN FULL

10/07/2009 15:33

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PAGE 13/15

Wierch Bn
HILL COUNTRY RECYCLING CORP.

(830) 693-3667

2000 2ND Street Marble Falls, TX 78654

LT ANSWERING

Blue Face n/llr Wierch Brothers
HILL COUNTRY RECYCLING CORP.

(830) 693-3667

2000 2ND Street Marble Falls, TX 78654

CUSTOMER'S NAME:

Eckhardt

ADDRESS:

CITY: STATE: ZIP:

DATE: LICENSE NO. CHECK NO.

8-7

WEIGHT ARTICLE PRICE AMOUNT

NO. 1 COPPER

NO. 2 COPPER

INSUL COPPER

RED BRASS

YELLOW BRASS

DIRTY BRASS

RADIATORS

ALUMINUM COOLERS

CAST ALUMINUM

SHEET ALUMINUM

DIRTY ALUMINUM

ALUMINUM CANS

ALUMINUM COPPER CORE

ALUMINUM

A.C.S.R.

NEOPRENE

STAINLESS STEEL

LEAD

BATTERIES

IRON

SHORT IRON

200 WCL Pickup

13520 TIN CB

24680 1b GROSS

41620 1b GROSS

16940 1b GROSS

20680 1b GROSS

7420 1b GROSS

13520

I hereby certify that I have the right to possess
 and sell this property.
 Por medio de esta firma, alego y verifico
 que yo soy el dueño de esta propiedad y tengo
 el derecho de poseerla y venderla

GRAND
TOTAL

Signed By:

RECEIVED PAYMENT IN FULL

CUSTOMER'S NAME:

Eckhardt

ADDRESS:

CITY: STATE: ZIP:

DATE: LICENSE NO. CHECK NO.

8-7

WEIGHT ARTICLE PRICE AMOUNT

NO. 1 COPPER

NO. 2 COPPER

INSUL COPPER

RED BRASS

YELLOW BRASS

DIRTY BRASS

RADIATORS

ALUMINUM COOLERS

CAST ALUMINUM

SHEET ALUMINUM

DIRTY ALUMINUM

ALUMINUM CANS

ALUMINUM COPPER CORE

ALUMINUM

A.C.S.R.

NEOPRENE

STAINLESS STEEL

LEAD

BATTERIES

IRON

SHORT IRON

200 WCL Pickup

13520 TIN CB

24060 1b GROSS

41620 1b GROSS

19460 1b GROSS

20560 1b GROSS

7460 1b GROSS

13520

I hereby certify that I have the right to possess
 and sell this property.
 Por medio de esta firma, alego y verifico
 que yo soy el dueño de esta propiedad y tengo
 el derecho de poseerla y venderla

GRAND
TOTAL

Signed By:

RECEIVED PAYMENT IN FULL

10/07/2009 15:33

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LT ANSWERING

PAGE 14/15

Indeco Environmental
103 Chaparral
Nederland, TX 77627
USA

Voice: 409-727-2442
Fax: 409-729-7907

Invoice

Invoice Number
090806-812

Invoice Date
Mar 7, 2008

Page
1

Sold To:

Ship to:

Weirich Bros. Inc.
304 HWY. 281 South
Johnson City, TX 78636
USA

Customer ID		Customer PO		Payment Terms	
Weirich		Verbal Terry Weirich		Net 30 Days	
Sales Rep ID		Shipping Method		Ship Date	Due Date
Linda		Central Express		3/7/08	4/6/08
Quantity	Item	Description	Ship Order Qty	Unit Price	Extension
5.00	ENVA SS-2	2.2 cu ft loose-filled bag, Absorption: 12 - 15 gal/bag		29.85	149.75
1.00	ENVR MDL MME 5	Microbial Digester Liquid MME, facultative microbes, 5 gal		100.00	100.00

Check/Credit Memo No: 0908061234

5

Subtotal	249.75
Sales Tax	20.60
Freight	80.00
Total Invoice Amount	350.35
Payment/Credit Applied	350.35
TOTAL	0.00

overdue invoices are subject to late charges of \$1.00 per month.

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LT ANSWERING

PAGE 15/15

InvoiceInvoice Number
090806-261Invoice Date
Aug 20, 2008

Page

Voice -2442
Fax 9-7907**Sold To:**Weirich Bros Inc
P.O. BOX 206
Johnson City, TX 78036
USA**Ship to:**304 HWY 291 South
Johnson City, TX 78036

Customer ID		Customer PO	Payment Terms		
Weirich		Verbal	Net 30 Days		
Sales Rep ID		Shipping Method	Ship Date	Due Date	
Kurtis		Fed Ex Ground	8/12/08	9/19/08	
Quantity	Item	Description	Backorder Qty	Unit Price	Extension
2.00	ENVR MDL MME 5	Microbial Digester Liquid MME, fabulitative microbes, 5 gal		100.00	200.00

Check/Credit Memo No: 090806

Subtotal	200.00
Sales Tax	16.80
Freight	34.70
Total Invoice Amount	251.20
Payment/Credit Applied	251.20
TOTAL	0.00

Overdue invoices are subject to late charges of 2.5% per month.